

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 Case No.: 3:20-cv-00365-WGC

4 HYAPATIA GATHERS, O/B/O MINOR
5 CHILD, A.G.,

6 **Order**

7 Plaintiff

8 Re: ECF No. 11

9 v.

10 ANDREW SAUL,
11 Commissioner of Social Security
12 Administration

13 Defendants
14

15 Before the court is Defendant Andrew Saul's (Commissioner of Social Security
16 Administration) Motion to Dismiss the Complaint Pursuant to Federal Rule of Civil Procedure
17 12(b)(6). (ECF Nos. 11, 11-1.) Despite being given an extension of time, Plaintiff did not file a
18 response.

19 After a thorough review, the Commissioner's motion is granted.

20 **I. BACKGROUND**

21 On June 17, 2020, Plaintiff Hyapatia Gathers filed an application to proceed *in forma*
22 *pauperis* (IFP) and pro se complaint on behalf of minor child A.G.. (ECF No. 1-1)

23 On August 18, 2020, the court issued an order granting the IFP application, allowed
24 Plaintiff's complaint to proceed, and the complaint was filed. The complaint seeks review of the
25 disability determination of the Social Security Administration as to the minor's application for
26 Social Security benefits. (ECF Nos. 4, 5.) An appearance was entered on behalf of the
27 Commissioner on August 20, 2020. (ECF No. 8.) The court granted the Commissioner's request

1 for an extension of time to file the certified administrative record and answer the complaint.
2 (ECF No. 10.) On December 15, 2020, the Commissioner filed this motion to dismiss the
3 complaint as time-barred. (ECF No. 11.) On February 10, 2021, the court gave Plaintiff an
4 additional 30 days to file a response to the motion to dismiss (ECF No. 12), but as of the date of
5 this order, Plaintiff has not filed a response.

6 II. DISCUSSION

7 A Social Security claimant has 60 days from the date he or she is mailed notice of the
8 Appeals' Council's denial of review of an administrative law judge's (ALJ) decision to file an
9 action in the United States District Court requesting review of the Social Security
10 Administration's decision. 42 U.S.C. § 405(g). The claimant is presumed to have notice of the
11 Appeals' Council decision five days after the date of the Appeals Council's notice, unless there is
12 a reasonable showing to the contrary. 20 C.F.R. § 422.210(a), (c).

13 The 60-day time limit for bringing suit in federal court "constitutes a statute of
14 limitations." *Vernon v. Heckler*, 811 F.2d 1274, 1277 (9th Cir. 1987) (citations omitted). The
15 statute of limitations defense may be raised in a motion to dismiss "if the running of the statute is
16 apparent from the face of the complaint." *Id.* (citation omitted). The 60-day limitations period is
17 subject to equitable tolling. *Id.* (citing *Bowen v. City of New York*, 476 U.S. 467 (1986)).

18 Here, the running of the sixty-day limit is not clear from the face of the complaint;
19 however, the court may take judicial notice of the information concerning the case taken from
20 the Electronic Disability case processing, set forth in the Declaration of Christianne Voegelé,
21 who is the Chief of Court Case Preparation and Review for Branch 1 of the Office of Appellate
22 Operations for the Social Security Administration. (ECF No. 11-1.) *See Khoja v. Orexigen*
23 *Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018) (an exception to the general rule that a

1 court may not consider matters outside the pleadings when ruling on a motion to dismiss is the
2 court may consider matters of which it may take judicial notice under Federal Rule of Evidence
3 201; Rule 201 allows a court to take judicial notice of a fact "not subject to reasonable dispute").
4 Therefore, the court may still resolve this matter through a motion to dismiss without converting
5 the motion to one for summary judgment.

6 The Commissioner presents evidence that Plaintiff filed the application for benefits on
7 behalf of the minor child on March 23, 2016. The application was denied initially and on
8 reconsideration, and Plaintiff had a hearing before an ALJ. The ALJ denied relief in a decision
9 dated April 22, 2019. (ECF No. 11-1 at 5-20.) Plaintiff requested review by the Appeals Council,
10 and the Appeals Council denied the request for relief on March 26, 2020. (ECF No. 11-1 at 27-
11 32.) The Appeals Council specifically informed Plaintiff she had 60 days to file a civil action if
12 she disagreed with the determination, and that the Social Security Administration would assume
13 she received the Appeals Council's notice five days after the date of the notice, and if she
14 required an extension, she could request one in writing. (*Id.* at 29.)

15 The deadline for Plaintiff to file the action in federal court was 65 days from the date of
16 the Appeal's Council notice, or May 30, 2020. The complaint was filed on June 17, 2020, and
17 there is no evidence in the record that Plaintiff requested an extension. Nor has Plaintiff
18 responded to show any grounds for equitable tolling. Therefore, the complaint is untimely.

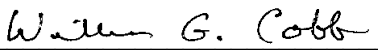
19 Since the defect cannot be cured by amendment, the complaint will be dismissed with
20 prejudice.

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3 **III. CONCLUSION**

4 The Commissioner's Motion to Dismiss (ECF No. 11) is **GRANTED**, and the complaint
5 is **DISMISSED WITH PREJUDICE**, and the Clerk shall enter **JUDGEMENT** in the
6 Commissioner's favor.

7 **IT IS SO ORDERED.**

8 Dated: April 29, 2021

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William G. Cobb
United States Magistrate Judge
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